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June 28, 1996

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, DC 20554

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JUN 28 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

RE: Ex Parte Presentation: CS Docket No. 96-61

Dear Mr. Caton:

On Thursday, June 27, 1996, Jonathan Jacob Nadler and Adam D. Krinsky, on behalf of the Independent Data Communications Manufacturers Association ("IDCMA"), met with Melissa S. Waksman, Patrick J. DeGraba, Jordan Goldstein, and Christopher M. Heimann of the Policy & Program Planning Division of the Common Carrier Bureau.

At the meeting, the parties discussed the pleadings filed by IDCMA in CC Docket No. 96-61 and the information presented in the attached document, which was distributed at the meeting. In accordance with Section 1.1206(a) of the Commission's Rules, two copies of this written submission are attached to this letter for inclusion in the public record. Due to the lateness of the hour at which this meeting concluded, this letter is being filed on the next business day, Friday, June 28, 1996.

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Squire, Sanders & Dempsey

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Please contact the undersigned if you have any questions.

Sincerely,



Jonathan Jacob Nadler

Enclosure

cc: Patrick J. DeGraba
Jordan Goldstein
Christopher M. Heimann
Melissa S. Waksman

Ex Parte Presentation of the Independent Data Communications Manufacturers Association,
CC Docket No. 96-61

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**THE COMMISSION SHOULD PRESERVE
THE CPE NO-BUNDLING RULE**

JUN 28 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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I. The Commission Must Consider the Public Interest Benefits of the No-Bundling Rule

- As the Commission has recognized repeatedly, the No-Bundling Rule has been one of the agency's most successful policy initiatives. The Rule has served the public interest by promoting user choice and fostering the development of an innovative, highly competitive CPE market.
- If the Commission now seeks to change course, it must demonstrate that doing so would provide public interest benefits that are sufficiently substantial to outweigh the costs of eliminating the Rule.
- The Notice does not even attempt to do so. Rather, the proposal is based solely on the fact that the Commission has determined that the interexchange market is "substantially competitive" and the on assumption that, as a result, IXC's cannot engage in conduct -- such as "tying" or "monopoly leveraging" -- that would violate the federal antitrust laws.
- The existence of a degree of competition in the interexchange market, standing alone, does not ensure that IXC's lack the ability to harm competition in the CPE market. To the extent that antitrust considerations are relevant, the Commission has failed to assess the dispositive question: Do IXC's have the ability to dictate their customers' CPE?
- In any case, the No-Bundling Rule does more than prevent dominant carriers from violating the antitrust laws; it is intended to advance the public interest by promoting user choice. For the reason, the Rule has been applicable to all carriers, not just those with market power.

II. CPE Bundling Would Provide No New Benefits To Consumers

- With the exception of AT&T, no party has forcefully argued for elimination of the CPE No-Bundling Rule. Indeed, even some "rebundling" advocates, such as MCI and NYNEX, recognize the substantial benefits the Rule has provided.
- Elimination of the No-Bundling Rule is not necessary to allow interexchange carriers to offer "one-stop shopping." IXC's can (and do) offer packages that consist of transmission service and CPE, provided that the service and CPE components are separately priced and also offered on a stand-alone basis.
- Elimination of the No-Bundling Rule would not be deregulatory. To the contrary, the Commission's proposal would allow IXC's -- for the first time since 1980 -- to provide CPE as part of their regulated service offering.
- Elimination of the CPE No-Bundling Rule would not lower the total cost of service/CPE packages. It merely would allow IXC's to shift the cost of CPE from CPE-specific charges to increased service charges.

III. Elimination Of The No-Bundling Rule Would Be Unlawful, Inconsistent with Congressional Policy, And Not In The Public Interest

- Allowing IXC's to bundle CPE would deprive consumers of the benefits of a truly independent manufacturing sector.
 - Independent manufacturers have been a consistent source of innovation. They also have unique incentives to develop CPE that competes "intermodally" with carrier-provided transmission service.
 - If the Commission adopts its "rebundling" proposal, a significant portion of the CPE market will be foreclosed.
 - * IXC's will be able to require their transmission service customers to use carrier-provided CPE.
 - * IXC's will use their ability to price basic services modestly above cost to generate the relatively small amount of revenue necessary to offer deeply discounted or "free" CPE.
 - Even if this did not constitute a violation of the antitrust laws, it would reduce the number of independent manufacturers, and would force many of the remaining manufacturers to shift their focus from serving the end-user market to becoming vendors to the carriers.

- **Allowing IXC's to bundle CPE would violate the non-discrimination provision in Section 202 of the Communications Act by allowing carriers to make transmission service available exclusively, or on favorable terms, to customers that accept carrier-provided CPE.**
- **Allowing IXC's to bundle CPE would be inconsistent with Section 304 of the Telecommunications Act, which preserves the No-Bundling Rule and extends the unbundling policy to all cable and other multichannel video programming systems, regardless of their market power.**
- **Allowing IXC's to provide CPE as part of their regulated offering would blur the boundary between regulated and non-regulated activities, making application of the Commission's Part 68 and network disclosure rules more difficult. This also would complicate the funding mechanism for universal service, which is likely to be based on the revenues that a carrier derives from the provision of regulated transmission service.**
- **Allowing IXC's to bundle CPE would violate U.S. international obligations, contained in GATS and NAFTA, to ensure that common carriers allow enhanced service providers and other end-users to attach the CPE of their choice to any public telecommunications network or service.**
- **Allowing IXC's to bundle CPE would lead to demands for further erosion of the No-Bundling Rule. Indeed, AT&T already has requested the Commission to allow IXC's to bundle enhanced services, while the BOCs have demanded that any change in the CPE bundling rules also be applicable to the local exchange market.**

IV. Requiring IXC's to Offer an Unbundled Service Option is Necessary, But Inadequate

- The Commission's alternate rebundling proposal -- modelled on the rule in the cellular market -- would allow an IXC to bundle transmission service and CPE, provided it also offers transmission service on a non-discriminatory, unbundled basis.
- As the Commission has recognized, Section 202 of the Communications Act requires carriers to provide transmission service on an unbundled, non-discriminatory basis.
- Allowing carriers to also offer a bundled services-CPE option would provide no additional benefits: it is not necessary to allow one-stop shopping, is not deregulatory, and would not lower costs.
- The alternate proposal also would threaten the viability of the independent manufacturing sector.
 - The fact that most rebundling advocates support the alternate proposal constitutes a recognition that IXCs retain a degree of market power.
 - If this is the case, however, merely requiring an unbundled option would not prevent competitive abuse. IXCs would be able to raise prices modestly above cost, thereby generating the relatively small cross-subsidies necessary to offer deeply discounted or "free" CPE.
 - As with the principle rebundling proposal, the end-result would be to reduce the number of independent manufacturers, and to force remaining manufacturers to act solely as vendors for the carriers.
- Permitting carriers to provide deeply discounted or "free" CPE to promote the sale of their basic transmission service also would violate Section 202 of the Act.
- The Commission's Cellular CPE Bundling Order does not provide an appropriate precedent for bundling in the interexchange market. In the cellular market, most customers deal with an independent vendor that offers CPE from multiple manufacturers. In contrast, most interexchange customers deal directly with the carrier. As a result, IXCs have a far greater ability than cellular service providers to dictate their customers' CPE choices. Allowing bundling in the interexchange market, therefore, raises far more serious concerns than it does in the cellular market.

V. The Commission Should Defer Consideration of any Change in the No-Bundling Rule For Three Years

- The Commission's rebundling proposal is predicated on the growth of competition in the interexchange and CPE markets. In the coming years, however, the level of competition in these markets will be affected by numerous factors, including: BOC mergers, BOC entry into the CPE market, the reclassification of AT&T as non-dominant, the likely elimination of tariff filing requirements in the interexchange market, access charge reform, and international negotiations.
- The prudent course is for the Commission to defer action on the rebundling proposal until the effect of these changes can be assessed.
- There is little cost to this approach. Pending Commission action, carriers may continue to offer "one-stop-shopping." If any carrier can make the case that bundling of a specific offering is in the public interest, the Commission retains authority to issue appropriate waivers.